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EVIDENCE AS TO SIMILAR OFFENSES, ACTS OR TRANSACTIONS IN CRIMINAL CASES

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This is one of a series of memoranda on criminal law questions prepared under the direction of Bert M. Keating, Denver District Attorney, for the use of his staff and for distribution to other prosecuting attorneys in Colorado.

The general rule is that evidence is inadmissible which shows that the accused has committed a crime wholly independent of the one for which he is being tried. No one is to be convicted of one crime by proof that he is guilty of another. Such evidence tends to prejudice the accused with the jury, multiplies the issues and is likely to confuse and mislead the jury. See *Warford v. People*, 43 Colo. 107, 112, 96 P. 556; *Jaynes v. People*, 44 Colo. 535, 543, 99 P. 325.

EXCEPTIONS TO THE GENERAL RULE

Two exceptions to the general rule exist: (1) Evidence as to similar offenses, not too remote in time to be of evidentiary value,[1] is admissible to show scheme, plan, design, motive, intent, knowledge or identity, or any material combination of them; (2) evidence as to other offenses is necessarily admissible when they are so interwoven with the charged offense that it is impossible adequately to show such charged transaction without relating them.

OFFER AND RECEPTION OF SUCH EVIDENCE

When evidence as to similar offenses is about to be offered, the prosecutor should explain the specific purpose for which it is being presented. When it is received, the court should then spe-

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[1] " * * * The question of excluding evidence because of remoteness rests largely in the sound discretion of the trial court. Remoteness is a matter of degree. Its essence is such as a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in proof of the latter. The term is one which has regard to factors other than mere lapse of time; and it is said that, while time may be a practically controlling feature in some situations, yet comparatively few generalizations based upon lapse of time alone can be made safely; that evidence which is relevant, as directly tending to prove a fact in issue, is not incompetent merely because of remoteness in point of time; and that remoteness depends to a large extent on the nature of the case. Even where the evidence is very remote, the question must be determined by the circumstances. However, the question of remoteness so frequently arises in connection with the matter of time that it may be stated as a general rule that, to be admissible, evidence must not be so remote in point of time as to be immaterial." 22 C.J.S. Criminal Law § 638.

For a practical application of the test, see Rice v. People, 55 Colo. 506, 136 P. 74, and Coates v. People, 106 Colo. 438, 487-488, 106 P. 2d 354, discussed at page 8 herein. See also Perry v. People, 116 Colo. 440, 445, 181 P. 2d 439, and Thorp v. People, 110 Colo. 7, 11, 129 P. 2d 296, discussed at page 9 herein.

cifically instruct the jurors as to the very limited purpose for which it is received and for which they may consider it. *Jaynes v. People,* 44 Colo. 535, 544, 99 P. 325; *Schneider v. People,* 118 Colo. 543, 558-559, 199 P. 2d 873; *Sanders v. People,* 109 Colo. 243, 247, 125 P. 2d 154.

In *Jaynes v. People, supra,* the procedure is thus set forth:

> The general rule is that evidence is not admissible which shows or tends to show that the accused has committed a crime wholly independent of the offense for which he is on trial. * * *. To this rule, however, there are exceptions, as where the evidence of another offense tends to prove some element of the one for which the accused is being tried, or the motive for committing the acts which it is claimed constitute the offense for which he is being tried, are committed by the accused for some particular purpose which he intended to accomplish. * * *
>
> When such testimony is received the trial judge should then limit it to the purpose for which it is admitted. Perhaps we have never determined that a failure to so limit it when not requested by the defendant is reversible error, but we have intimated in Warford v. People, supra (43 Colo. 107, 96 P. 556), that this course should be pursued by trial courts.
>
> We also think that when evidence of the character under consideration is offered by the district attorney, good practice requires that he should state the purpose for which it is offered, and that the trial judge in the instructions given, when requested by the defendant, should instruct the jury on the subject of the purpose for which they may consider such testimony. These precautions should be observed because of the fact, as above indicated, that such evidence tends to create a prejudice in the minds of the jury; but of this he will not be permitted to complain if the evidence is competent, and his rights are safeguarded in the manner we have suggested.

INSTRUCTIONS ON SIMILAR ACTS

While the court opinions dealing with this type of evidence most frequently refer to similar "crimes" or "offenses," which is usually what they are, nevertheless, in so far as the jury are concerned, such acts should be called "other transactions" in offering them in evidence and in the instruction given the jury regarding them. This applies to cases arising under either of the exceptions to the general rule. In *Johnson v. People,* 110 Colo. 283, 296, 133 P. 2d 789, it was held that an instruction referring to "separate and other offenses than the offense charged" was prejudicial to the defendant. The approved instruction is this:

> There is some evidence with reference to other transactions than that charged in the information. This evi-

> dence is admissible only as bearing upon the question of whether or not the defendant had a plan or design to produce a result of which the act charged in the information was a part, and you can consider such evidence for no other purpose. The defendant cannot be tried for or convicted of any other offense not charged in the formation.

See *Torbert v. People,* 113 Colo. 294, 303, 156 P. 2d 128; *Silliman v. People,* 114 Colo. 130, 145, 162 P. 2d 793; *Perry v. People,* 116 Colo. 440, 444, 181 P. 2d 439.

QUANTUM OF PROOF

The evidence as to other transactions need not prove them beyond a reasonable doubt, but need only tend to prove defendant guilty thereof. *State v. Dougherty,* 266 Ill. 420, 107 N. E. 695, 701; *Lund v. State,* 207 Ind. 347, 190 N. E. 850, 853; *State v. Hyde,* 234 Mo. 200, 136 S. W. 316, 332; *State v. Meininger,* 306 Mo. 675, 268 S. W. 71, 77-78; *State v. Blackwell,* 65 Nev. 405, 200 P. 2d 698, 699; *Scott v. State,* 107 Oh. St. 475, 141 N. E. 19, 26, overruling an earlier case; 22 C. J. S. Criminal Law §690. *Contra, Lankford v. State,* 93 Tex. Cr. 442, 244 S. W. 389.

NO JEOPARDY AS TO SIMILAR ACTS

Evidence as to similar acts for their bearing on the issue of frame of mind or identity of defendant in the charged offense does not constitute former jeopardy as to such acts if they are subsequently prosecuted. They are not in issue in the charged offense and cannot be adjudicated. 22 C. J. S. Criminal Law §243, p. 377; *United States v. Brimsdon,* D. C. Mo., 23 F. Supp. 510; *State v. Momb,* 154 Kan. 435, 119 P. 2d 544; *State v. Healy,* (Minn.) 161 N. W. 726, L. R. A. 1917D 726. Kansas now has a statute (G. S. 1935, 62-1449) creating jeopardy as to similar offenses if such a crime could have been charged in the indictment or information for the crime on trial in a separate count as properly joinable offenses, or if the prosecution could have relied upon one of them for conviction under the charge on trial, as in sex cases where no specific date is charged and a number of offenses against the woman by the defendant within the statute of limitations are shown. It will be noticed that it required a statute to accomplish this.

WHERE OTHER OFFENSES SHOWN IN CONFESSION

If the similar offenses appear in an accused's confession of the charged crime, they are admissible as part of such confession without further proof. *Schneider v. People,* 118 Colo. 543, 553, 558, 199 P. 2d 873. And see *Williams v. People,* 114 Colo. 207, 212, 158 P. 2d 447. As will be seen at a later point (p. 5, par. 3), the offer and reception of such evidence must be handled with the same care as is emphasized in *Jaynes v. People, supra.*

This principle that evidence of other crimes appearing in a confession of the charged offense is admissible as a part of such

confession is thus stated in 7 Wigmore, Evidence (3d ed.), §2100e, page 497:

> Of course, the prosecution may desire here to invoke the rule (post, §2115) allowing the whole [confession] to be put in. This is usually the case where the confession contains a mention of another crime committed by the accused. On the usual principles (ante, §§194, 300-367), this additional crime would ordinarily not be provable for its own sake; yet under the present principle and that of §2115, post, the accused's allusion to it in his confession may and must be listened to if it is a part of the one entire statement confessing the crime charged at bar.

Wigmore's statement of this principle was specifically adopted and quoted in *Williams v. People,* 114 Colo. 217, 212, 158 P. 2d 447. There, defendant, charged with the murder of her newborn child, signed a confession not only admitting that murder, but also relating that she had drowned two other of her newborn babies, the bodies of all three having been found at one time in a chest or box. Of this confession, the supreme court said:

> The third was an objection to the admission of defendant's written confession, and the fourth was a motion that the confession be withdrawn and the jury instructed to disregard it, both on the ground that the confession involved three separate alleged crimes. These were without merit, under the rule that "where the confession contains a mention of another crime committed by the accused," his "allusion to it in his confession may and must be listened to if it is a part of the one entire statement confessing the crime charged at bar." Wigmore on Evidence (3d ed.), vol. VII, p. 497, §2100(e). * * *
>
> In addition to the fact that this evidence was so intermingled that it was impossible to make proof regarding the finding of the one body without showing the finding of the other two, the evidence concerning the two earlier babies was admissible otherwise in proof of deliberation in the crime charged, rather than the frantic hysteria of tragedy and inexperience, and also in proof of a preconceived plan of disposing of defendant's offspring in case of pregnancy resulting from her amours. Further, it strengthens the presumption and proof of life, and the possession of the three bodies strengthens the *identity* of defendant in whose possession they were found as the perpetrator of the crime.

The principle again was applied in *Schneider v. People,* 118 Colo. 543, at 552-553 and 558, 199 P. 2d 873. There, defendant was accused of a murder, which the evidence showed was in the course of a robbery. He made an oral confession, which he later

repeated twice, in which he admitted the murder charged and also confessed that later he had committed two similar crimes in Michigan, they being perpetrated in substantially the same manner and for a like purpose as the murder charged. Over the objection of defendant, the trial court admitted testimony as to these confessions in their entirety "solely for the purpose of showing intent, motive, plan, or design, of the defendant in the alleged commission of the act charged in the information." The jury were also charged, "Such evidence is to be considered by you for the indicated purpose only, and under no circumstances are you to consider it for any other purpose whatsoever."

The supreme court noted, as will be seen presently, that a great diversity of opinion existed among the authorities as to the admissibility of an entire confession, and then concluded that in Colorado the entire confession is admissible. In discussing the matter, the supreme court said (118 Colo. 552):

> Counsel for defendant rely upon the general rule that evidence is inadmissible which shows, or even tends to show, that the defendant has committed a crime wholly independent of the offense for which he is on trial, but they also recognize that there are many exceptions to this rule. In Colorado we have held that some of the exceptions to the general rule, *equally well-settled as the rule itself,* are that it is competent to show that defendant on trial for a specific offense has participated in similar crimes in order to establish either *motive, intent, plan, design or scheme,* and to establish defendant's *identity,* and such evidence is not inadmissible merely because it establishes that defendant is guilty of another crime [citing Colorado cases].
>
> The general rule for which defendant contents is inapplicable in the present case. Here, defendant, so far as is disclosed by the record, made a free and voluntary confession in which he not only admitted the murder of Ford, with which crime he was charged, but in the same confession, at the same time, and as an integral part thereof, he admitted that he had been guilty of similar robberies, kidnappings and murders subsequent to the one for which he was to be tried. Here the only question for our determination is whether the entire confession was properly admitted, or whether only that part directly pertaining to the Ford murder was admissible. In determining this question we have read and carefully considered all decisions called to our attention by defendant as well as many others. We find that there is a great diversity of opinion as to the admissibility of an entire confession, but have concluded that in this and some other jurisdictions the question has been determined adversely to defendant's contention. * * *

> From a careful consideration of our decision in Reppin v. People, *supra* (95 Colo. 192, 34 P. 2d 71), and Williams v. People, *supra* (114 Colo. 217, 158 P. 2d 447), we are persuaded that in this jurisdiction when a defendant charged with a criminal offense, even though that offense be murder, makes a free and voluntary confession, either oral or written, in which he admits his guilt of the offense charged, and in the same confession and at the same time admits that he participated in and committed other similar offenses, such confession is admissible in evidence and is relevant and may be considered by the jury as bearing upon the motive, intent, plan, scheme and design to establish the commission of the crime charged.
>
> When such a confession is offered in its entirety, the district attorney should explain the purpose for which the evidence of offenses other than that charged is offered, and the court should instruct the jury as to the purpose of the evidence and that it is limited in its consideration of such other offenses. If this procedure is followed, no error is committed.

APPLIES TO EITHER ORAL OR WRITTEN CONFESSION

It should be noticed that *Williams v. People, supra,* involved a written confession, while *Schneider v. People, supra,* related to an oral confession, and that the *Schneider* case specifically states that the principle is applicable to "either oral or written" confessions.

EXAMPLES OF THE GENERAL RULE

As stated, the general rule is that evidence which shows or tends to show the commission of unrelated crimes by a defendant is inadmissible.

It is clear from the Colorado cases that the mere fact that such other acts constituted a crime of the same name as that for which defendant is on trial is not of itself sufficient to warrant admission of evidence as to them under the exception relating to scheme, plan, design, intent or identity. It must appear that they are so connected in time and so similar in their other relations to the crime charged as to throw light upon it from the view of the specific purpose for which they are offered. See *Elliott v. People,* 56 Colo. 236, 240, 138 P. 39.

The specific point for which such acts are to be shown must be definitely stated, and the question of their admissibility must be tested solely by that point. It is not enough that they might be admissible under some other point within the Exception. Thus, in *Webb v. People,* 97 Colo. 262, 265-266, 49 P. 2d 381, the district attorney offered the evidence of an alleged similar offense for the purpose "of showing intent to commit robbery, and for that purpose only." The court's instruction, however, stated that the evidence was admissible only "as bearing upon the question of intent

or motive of the defendant in connection with the crime here charged or of whether or not the defendant had a plan or design to produce a result of which the act charged in the information was a part." Defendant objected on the ground that the offer had been limited to "intent," and that "no mention was made of a plan or design, nor does the testimony tend to show any plan or design." The trial court overruled the objection, and the supreme court held that this was error because "there was nothing in the evidence to indicate the kind of 'plan or design' which can be proved under the recognized exception."

Again, in *Cargill v. People,* 73 Colo. 218, 220, 214 P. 387, Cargill and another were charged with the burglary of a drug store in Colorado Springs. This other man, who was then serving a sentence for the burglary, testified for the prosecution and was permitted to testify that about a month before the burglary he and Cargill had burglarized a residence in the same city. The trial court allowed the evidence on the theory of corroboration and explanation, and told the jury that it was to be considered only as tending to show plan or scheme. The supreme court held that the admission of the evidence was error because it failed "entirely to disclose any plan or scheme." The court recognized, however, that the evidence of other offenses is admissible in burglary cases to show identity, intent, motive or system. The evidence in question clearly was admissible to show identity if it had been offered for that purpose. Moreover, it is now settled that in burglary cases such evidence is admissible to show scheme, plan and design to gain a livelihood through the commission of burglaries. *Perry v. People,* 116 Colo. 440, 446, 181 P. 2d 439.

ENFORCEMENT OF THE GENERAL RULE

An example of the enforcement of the general rule where the supposed similar offense was of a different character appears in *Wood v. People,* 60 Colo. 211, 213, 151 P. 941. There, where the charge was that Wood and Miller had committed a robbery, Miller became a witness for the prosecution, and the question arose as to how long the pair had been acquainted. The prosecution was permitted to introduce evidence tending to show that Wood was guilty of criminal sexual relations with Miller's sister, and the conviction of Wood was reversed because of the admission of that evidence, the supreme court saying: "Whether Wood kept company with Mamie—had slept in the same bed with her—was wholly immaterial, for the simple reason that such proof was not essential, or in any wise necessary, to the proof of acquaintanceship of Wood and Miller. The minds of the jury must not be prejudiced against the prisoner unless the proof of the case requires it."

In *Munfrada v. People,* 99 Colo. 80, 60 P. 2d 223, where Munfrada and another were on trial for the theft of seed potatoes, it was held reversible error for the trial court to have allowed the prosecutor to inquire of Munfrada on cross-examination as to his possible theft of a tire in an entirely distinct transaction.

Nor can a sweeping generality as to other offenses by a defendant be permitted in evidence. Thus, in *Sanders v. People,* 109 Colo. 243, 246, 125 P. 2d 154, it was held reversible error for the trial court to fail to strike out the testimony of a police witness that, "I handled the man (defendant) before. He has a record a mile long."

EXAMPLES OF EXCEPTION 1

The first exception is that where intent, knowledge, scheme, plan, design, motive or identity is relevant to the issue in the charged offense, similar acts by the defendant are admissible in evidence for the bearing they may have in aiding determination of such particular point or points, even though such evidence may show the commission of another crime, "provided such extraneous transactions are so connected as to time and are so similar in their other relations" that the same may be attributed to them all. *Elliott v. People,* 56 Colo. 236, 240, 138 P. 39; *Warford v. People,* 43 Colo. 107, 112, 96 P. 556; *Williams v. People,* 114 Colo. 207, 213, 158 P. 2d 447; *Perry v. People,* 116 Colo. 440, 444.

"Such evidence has been admitted for such purpose for about a century" (*Whitfield v. People,* [1926] 79 Colo. 208, 215, 244 P. 470), and although the evidence may be prejudicial to the defendant in the minds of the jury, "of this he will not be permitted to complain if the evidence is competent." *Jaynes v. People,* 113 Colo. 294, 303, 156 P. 2d 128. Even if develops that the other acts may have been legitimate, the defendant cannot be prejudiced thereby. *Torbert v. People,* 113 Colo. 294, 303, 158 P. 2d 128; and see *Moore v. People,* ..... Colo. ....., 243 P. 2d 425, 430.

This same exception applies in civil fraud cases, where intent is in issue, to show knowledge and intent to defraud. *Sheridan Oil Corp. v. Davidson,* 75 Colo. 584, 588-589, 227 P. 553, cited in *Whitfield v. People,* 79 Colo. 108, 115, 244 P. 470; *Alley v. Tovey,* 78 Colo. 432, 534-535, 242 P. 999, distinguishing *Platt v. Walker,* 69 Colo. 584, 196 P. 190, and *Western Co. v. Creaghe,* 71 Colo. 334, 206 P. 795. See 37 C. J. S. Fraud §113, p. 424.

The doctrine of similar offenses in *sex* cases is considered later herein (p. 12) because of some limitations in the rule of Exception 1.

Reppin v. People, 95 Colo. 192, 34 P. 2d 71, illustrates both the general rule excluding, and this Exception 1 permitting evidence of similar offenses to show design, scheme, plan, motive, knowledge or identity. Reppin pleaded guilty to committing a murder which occurred in the course of a robbery, and the jury fixed the penalty at death. The supreme court set aside the conviction because the prosecution was permitted to show (1) that Reppin admitted arrest for conspiracy in a robbery some years before in Newark, New Jersey, and also (2) that "he had a vision of being able to build up a gang of about six men to go out to the Broadmoor Hotel and catch it when there was a large num-

ber of diners in the dining room of the hotel, and hold up the dining room," and also (3) that he and a companion went to a place called the "Pot and Spigot," intending to rob it, but that the companion "got yellow" and the scheme was abandoned. The supreme court said that evidence as to those facts was inadmissible under the exception because, "No holdup occurred, nor was one attempted."

On the other hand, the court held that it had been proper to admit in evidence, under this Exception 1, admissions of the defendant that he and others had (1) burglarized a store and stolen three guns, one of which was the murder weapon, and (2) were in the "Country Club stickup," had drawn a gun on the men in charge, tied them, and taken $12 from the cash register; and (3) on the next night had held up a station attendant at gun point, locked him in a toilet and then taken money from a till. The supreme court said that these offenses were sufficiently connected in point of time and the same motive might be imputed to the robbery in which the murder charged had occurred; and further that the evidence of them bore upon the intent of the defendant and the motive which prompted the homicide for which he was being tried.

Coates v. People, 106 Colo. 483, 487-488, 106 P. 2d 364, presents a bizarre application of Exception 1. Defendant was charged with murdering a police officer who intercepted him while he was forcing one Virginia Garcia to accompany him. She testified that defendant had tried to get her to "hustle" for him, and that she had shared her earnings with him at times. She had been living with another man for three months when defendant came and got her. He threatened her erstwhile paramour and another man when they interfered, and dragged her along until the officer intervened. In ruling that evidence as to defendant's pandering operations with Miss Garcia was admissible to show motive, the supreme court said:

> It cannot be disputed that Coates considered her an economic asset and that he would endeavor to frustrate any attempt to take her away from him. This sufficiently appears from defendant's own testimony on direct examination when in response to the question, "There has been some testimony, Joe, that you used Virginia Garcia as a prostitute and collected money from her; is that true? He answered, "Sure, yes, years ago, about—sure, I have done that." The evidence justified the conclusion that the same relationship continued up to the very time of the homicide, and that she had been "hustling" for him right along. A reasonable inference from the testimony in this case was that defendant shot Renovato because he thought the officer was attempting to take his "woman" away from him.

Smaldone v. People, 103 Colo. 498, 88 P. 2d 103, demonstrates the admissibility of evidence of collateral offenses which are not

the same crime charged but tend to show the motive for it. There, two Smaldone brothers and one Stephens were charged with assault to murder and conspiracy to do so, the attempt at murder having been by placing a bomb in the automobile of the victim, one Barnes. All of these persons were professional gamblers, the Smaldones and Barnes having worked for Stephens at Blakeland, his gambling resort which had been closed by injunction. Barnes located another likely spot in the vicinity and asked Stephens to join in a new gambling enterprise, but the latter demurred at the risk of operating so close to the former enterprise. Barnes got other partners and opened the new place, Cottonwood Ranch. After a month's operation, seven men, two of whom were identified as the Smaldones, robbed the place and took a safe containing $1,600; and presently the authorities closed the Ranch. Barnes asked Stephens to join him in reopening. He testified that he offered Stephens a 20 per cent interest, but the latter demanded one-third and said Barnes would not "live a week" if he reopened without him. Four days later, Barnes having reopened, a bomb exploded in his automobile, severely injuring him. The supreme court, in affirming the conviction, held that it had been proper to allow evidence (1) that Stephens had counseled and advised in the opening of Cottonwood Ranch, had demanded a share of the illict proceeds, and had threatened Barnes' life, and (2) that the Smaldones had been participants in the robbery of Barnes' place, and that Stephens knew they were under suspicion. It was said that even though some of these things showed the commission of other crimes, nevertheless the evidence went to show motive for the Smaldones and Stephens to combine to kill Barnes, even though the motives were different—the Smaldones to escape liability for the robbery, and Stephens to make good his threat. It should be noticed that the evidence as to robbery by the Smaldones extended only to an accusation by identification and not to a formal charge or a conviction.

Wilson v. People, 103 Colo. 150, 165-166, 84 P. 2d 463, illustrates the admissibility of like acts, including convictions, in the case of continuing offenses. There, defendant was charged with gambling for a livelihood and police officer Finney was permitted to testify to a former arrest of the defendant and as to his pleading guilty of conducting a gambling house when arrested under circumstances similar to those in the case on trial. In holding that such evidence was properly admitted, the supreme court said: "Gambling for a livelihood was one of the charges. From the very nature of that offense it is a continuing one and may and does involve man separate acts. In connection with defendants' reputation as gamblers, to which detective Finney also testified, we think evidence of the former arrest of Wilson and his plea of guilty was admissible."

Hamilton v. People, 87 Colo. 307, 309, 287 P. 651, shows that the fact that defendant has been convicted of and served a sen-

tence for another crime may be shown in the first instance by the prosecution if it is relevant and material to some issue in the criminal case on trial. Hamilton and one Stone were on trial for confidence game. They had been in penitentiary together. Hamilton was living in Denver and when Stone was released from the penitentiary he took up his abode at the same hotel where Hamilton was living, and within a week they were perpetrating the swindle for which they were being tried. They had been associated together before the penitentiary confinement, and on cross-examination Stone was asked when he next saw Hamilton after that earlier association and replied, "In Canon City. In the penitentiary." Hamilton contended that this was an unjustified attack on his reputation by showing he was an ex-convict and violated the rule of *Ryan v. People,* 66 Colo. 208, 180 P. 84, that the character of a defendant may not be attacked by the prosecution unless it is put in issue by him. In rejecting this contention of error, the supreme court said: "If the rule that the prosecution cannot, in the first instance, directly or indirectly attack the character of the defendant by showing conviction of guilt of other offenses, be given the construction and application here contended for, then the penitentiary becomes a sanctuary where conspiracies may be hatched and crimes committed with impunity, since the people can take no step toward their disclosure without revealing the place of their perpetration, and since that of itself casts a cloud upon the reputation of the accused. There is no such law. The true rule is that evidence of former convictions or other offenses may not, in the first instance, be directly or indirectly introduced if not material and relevant to the fact in issue, but, if so material and relevant, it is not excluded." 8 R. C. L. p. 200, §195; *State v. Moran,* 131 Ia. 645, 109 N. W. 187.

OTHER ACTS EITHER BEFORE OR AFTER

When meeting the other tests, the similar offenses offered in evidence may have occurred either before or after the crime for which the defendant is on trial. *Chasse v. People,* 119 Colo. 160, 163, 201 P. 2d 378 (confidence game); *Schneider v. People,* 118 Colo. 543, 199 P. 2d 873 (murder); *Perry v. People,* 116 Colo. 440, 445, 181 P. 2d 439 (burglary).

Prior offenses, prosecution of which would be barred by the statute of limitations, may be shown. *Perry v. People,* 116 Colo. 440, 445, 181 P. 2d 439 (burglary); *Thorp v. People,* 110 Colo. 7, 11, 129 P. 2d 296 (embezzlement).

In statutory rape cases, however, a different rule prevails. In them, similar acts which would be barred by the statute of limitations may not be shown. *Abbott v. People,* 89 Colo. 120, 121, 299 P. 153, following *Bigcraft v. People,* 30 Colo. 298, 70 P. 417, and *Curtis v. People,* 72 Colo. 350, 211 P. 381. The reason for this may be that in such cases a number of acts will be shown and the prosecution later elect upon which it will rely, and any

other rule might lead to a conviction of a barred offense. See *Schreiner v. People,* 95 Colo. 393, 395, 36 P. 2d 764.

"The length of time over which any inquiry as to other offenses committed by accused may extend is within the trial court's discretion; it has been said that, as a general rule, it must appear that the evidence of other offenses relates to offenses which occurred shortly before or after the commission of the offense on trial." *Perry v. People,* 116 Colo. 440, 445, 181 P. 2d 439. But it should be noticed that immediately preceding the statement just quoted, the court said: "Unrelated crimes which were barred by the statute of limitations may be introduced to show general plan, and prior crimes committed three years before are not too remote."

It should also be noted that it is not the date of the transaction supplying the motive and intent for the similar crime which controls, but rather the date of the act relied upon as such similar offense; and there may be several acts springing from that motivating transaction and they may be a year or two apart. See *Thorp v. People,* 110 Colo. 7, 11, 129 P. 2d 296.

Schneider v. People, 118 Colo. 543, 199 P. 2d 873, supplies an example of the admission of subsequent offenses as being relevant and bearing upon the motive, intent, plan, scheme and design to establish the crime charged. Defendant, on trial for a murder which occurred in connection with kidnapping and a robbery, made oral confessions admitting not only that crime but two subsequent murders following kidnapping and robbery in another state. It was held that these other crimes were admissible as part of the confessions for their bearing on the defendant's motive, plan, scheme, design and intent in the crime for which he was then on trial.

EXAMPLES OF EXCEPTION 2

The second exception is that other offenses may be shown in evidence when they are so interwoven with the principal transaction that it is impossible properly to show such charged offense without relating them.

In *Abshier v. People,* 87 Colo. 507, 289 P. 1081, defendant received the death penalty for a murder occurring during a holdup in a bank. It was held proper to admit evidence that defendant and his accomplices, in the course of the robbery and escape, had kidnapped a bank employee, carried him with them into Kansas, and then killed him to escape detection; and also, for the same purpose, had killed a doctor whom they had inveigled to their hideout to administer to an accomplice wounded during the robbery. Of this evidence, the supreme court said:

> Evidence of other crimes committed in Kansas was admissible. Such other offenses were indivisibly connected with, incidental to, and in furtherance of the plans of defendant and his confederates to rob the bank at Lamar, flee, conceal the evidence of their robbery and murder of Parrish, and escape pursuit. These acts were all a part

of a single transaction, an account of which could not be well related without the whole story appearing. As such, they were admissible.

In *Silliman v. People,* 114 Colo. 130, 145, 162 P. 2d 793, the defendant was accused of murdering his wife by poison. He had given her a drink of poisoned brandy, and she gave her infant daughter a sip of this and then consumed the remainder. Both died within a few minutes. At the trial, reference was made to the death of the child, and in holding this not to have been prejudicial error, the court said: "When we consider the fact that the death of the wife, with the murder of whom defendant was charged, and that of his daughter, occurred almost simultaneously in the room in defendant's home, it is apparent that the death of the daughter would be referred to inadvertently by one or more witnesses."

In *Williams v. People,* 114 Colo. 207, 212, 158 P. 2d 447, defendant was on trial for the murder of her newborn child, one of three babies she evidently had killed, and whose bodies were discovered at one time in the same box. It was ruled that evidence as to the finding of the other two bodies was admissible, not only for the purpose of showing scheme, intent and identity, but also because such evidentiary matter was "so intermingled that it was impossible to prove the case relied upon without also bringing out the facts as to the finding of the other bodies."

THE SEX-OFFENSE EXCEPTION

Proof of similar offenses in sex cases may be said to be a restriction of Exception 1 to the general rule in certain circumstances. While it is well established in Colorado that this kind of evidence is admissible in that type of case (*Shier v. People,* 116 Colo. 353, 359, 181 P. 2d 366) in corroboration and explanation of the act charged (*Mitchell v. People,* 24 Colo. 532, 535, 52 P. 671; *Laycock v. People,* 66 Colo. 441, 445, 182 P. 880), it is also settled that, unlike the situation as to other crimes, when the act charged, if proved, speaks for itself, as in the actual taking of indecent liberties (as distinguished from an "assault with intent to rape" or an "attempt" at indecent liberties), such similar acts are admissible in evidence only where they were against the victim of the act charged. *Dockerty v. People,* 74 Colo. 113, 114-115, 219 P. 220.

But, as will appear later (p. 15), evidence as to similar acts against others than the victim is admissible where the issue of "intent" is involved, as where defendant admits the act but attempts to explain or excuse it, or as in assault with intent to rape or attempt at indecent liberties with a child under the age of 16.

In *Dockerty v. People, supra,* 74 Colo. 113, 114, 219 P. 220, defendant was charged, not with attempting to take, but with an actual taking of, indecent liberties with the person of his 15-year-old daughter. On the theory that it tended to show design, motive

or intent under Exception 1, the prosecution was permitted to show acts of sexual intercourse between defendant and an older daughter some months before the offense charged. The conviction of Dockerty was reversed by the supreme court on the ground that the admission of the evidence of such other acts constituted prejudicial error. It was said:

> The exception is well established, and it is true, as the state contends, that the exception is broadened in case of sexual offenses. But nowhere does it appear that the conduct of a defendant with a person other than the one connected with the offense charged is admissible, even in the class of cases mentioned. Indeed, the law is settled that similar acts as to other persons cannot be shown in evidence. Wharton, Criminal Evidence (9th ed.) §46. In this case the evidence to which objection is made was clearly inadmissible. The only direct testimony as to the alleged criminal act was that of the prosecuting witness, and the defense was an absolute denial. *Had there been an admission of the acts, with an attempt to explain or excuse them, the question of intent might have been presented.* The testimony as to defendant's actions, if believed by the jury, would establish his guilt, both as to acts and intent. But, in addition, this testimony included declarations of the defendant which were conclusive of the purpose of the acts. There was, then, no possible reason for admitting the testimony of the other daughter. * * * In People v. Lonsdale, 122 Mich. 388, 81 N. W. 277, it is said: "Where the intent or guilty knowledge is a necessary conclusion from the act done, proof of other offenses of a similar character is inadmissible, and violates the rule that the evidence must be confined to the issue."

The holding of the *Dockerty* case is, then, that since the defendant denied doing the acts charged, rather than admitting and attempting to explain or excuse them, and since the victim's testimony, if believed by the jury, showed acts which we *per se* indecent liberties, "intent" was not in issue, and, therefore, there was neither room nor need for, nor relevancy to, further evidence by way of proof of similar acts against others as tending to show intent.

It appears from the original record in the *Dockerty* case—which the writer has carefully read—that the defendant's declarations, referred to in the opinion, simply supplied corroboration that defendant knew his acts were indecent liberties, since he was supplementing his acts with verbal solicitation of sexual intercourse. The acts included his touching of the victim's private parts. The declarations demonstrated his desire to have sexual intercourse, but his acts spoke for themselves as unmistakably being criminal indecent liberties with the person of his daughter.

If the jury believed her testimony, they could not escape concluding that indecent liberties in fact had been taken.

The court's statement that, "Indeed, the law is settled that similar acts as to other persons cannot be shown in evidence," obviously must be limited to sex cases and cannot apply to such offenses as larceny, burglary, and the like, where, as has been seen from pages 9-11, the admission of similar acts as to persons other than the victim of the charged offense has been repeatedly upheld by the Colorado supreme court. The authority cited in the opinion (Wharton, Criminal Evidence, §46) refers to sex offenses. But the court's statement undeniably gives the general rule in sex cases where the criminal intent or guilty knowledge is a necessary conclusion from the act done.

The court recognized, however, in the *Dockerty* case that a different rule applies if "intent" is an issue in sex cases when it added: "In this case the evidence to which objection is made was clearly inadmissible. The only direct testimony as to the alleged criminal act was that of the prosecuting witness, and the defense was an absolute denial. Had there been an admission of the acts, with an attempt to explain or excuse them, the question of intent might have been presented."

It is clear from this statement that if the question of intent is open and in issue, as in the hypothetical case stated by the court, then the full sweep of Exception 1, admitting similar acts with others as bearing on intent, would apply. And it follows logically that where the charge is "assault with intent to commit rape" or "attempt at indecent liberties"—and intent is thus an essential ingredient of the offense and an issue which the prosecution must prove beyond a reasonable doubt—evidence of similar acts with others would be admissible if meeting the other requirements of Exception 1. This matter will be discussed at length later, beginning on page 15.

WHERE PART OF THE RES GESTAE

Similar acts with others may be shown in sex cases, however, if they occurred during the principal transaction charged and are part of the *res gestae.* In *Granato v. People,* 97 Colo. 303, 49 P. 2d 431, where the defendant was charged with the statutory rape of one girl in an automobile, it was held proper to show that as a part of this same transaction he had aided a male companion in forcing another girl from the automobile so that the second man could rape her, thus showing him as being guilty of participating in a second rape as an accessory before the fact. The court held that such evidence related to facts that constituted an "inseparable part of the entire transaction."

This same principle in sex offenses was applied in the following cases from other jurisdictions: *People v. Kruvosky,* 53 Cal. App. 744, 200 P. 831; *People v. Hunt,* 17 Cal. App. 2d 284, 286, 61 P. 2d 1208, 1209; *People v. Paragone,* 327 Ill. 463, 158 N. E. 716, 718-719, distinguishing *People v. Gibson,* 255 Ill. 303, 99 N. E.

599, cited in *Dockerty v. People, supra,* 74 Colo. 113, 115, 219 P. 220, on the point of a self-speaking act (and see *State v. Dowell,* 47 Idaho 457, 276 P. 39, 40); *Landn v. State,* 77 Okl. Cr. R. 190, 140 P. 2d 242; *State v. Gerrish,* 161 Ore. 76, 87 P. 2d 769; *Turner v. State,* 187 Tenn. 319, 213 S. W. 2d 281; *State v. McDowell,* 61 Wash. 398, 112 P. 521, 522; *State v. Priest,* 132 Wash. 580, 232 P. 353, 354.

ACTS SHOWING PLAN OR SCHEME

Moreover, there is ample authority to the effect that despite the general rule that sex offenses against others than the prosecutrix are not admissible, nevertheless where the other offense is committed in circumstances remarkably similar to those in the offense charged, such evidence is admissible as showing a plan or scheme to commit the crime in that fashion, even though the offense was against a person other than the prosecutrix. The theory of these cases is that where several crimes are committed as part of one scheme or plan, and are all of the same general character and tend to the same end, they are relevant to show the process or motive or design leading up to the particular crime in issue. See *Taylor v. State,* 44 Ariz. 13, 97 P. 2d 543, 545; *State v. Martinez,* 67 Ariz. 389, 198 P. 2d 115, 116-117; *People v. Northcott,* 209 Cal. 639, 289 P. 634; *People v. Cosby,* 137 Cal. App. 332, 31 P. 2d 218; *People v. Cassandras,* 83 Cal. App. 2d 272, 188 P. 2d 546, 551; *People v. Sullivan,* 96 Cal. App. 2d 742, 216 P. 2d 558, 561; *Commonwealth v. Ransom,* 168 Pa. Super. 306, 82 A. 2d 547.

ASSAULT WITH INTENT TO COMMIT SEX OFFENSE

Dockerty v. People, supra, 74 Colo. 113, 219 P. 220, settles the proposition that in sex offenses where the charge is of an act which, if proved, *per se* shows criminality, and the accused does not admit the act and attempt to explain or excuse it, evidence of like acts against others than the particular victim is not admissible. But in that case the court clearly leaves the question open in situations where "intent" is a material issue, as where an act which could be construed as an indecent liberty is admitted by the accused, but he tries to exculpate himself by claiming his act was not done with wrongful intent. It logically follows that whenever "intent" is an issue, similar acts as against others are relevant in sex cases and admissible in evidence as bearing on intent; as, for example, where the charge is "assault with intent to commit rape" or "attempt to take indecent liberties." In such cases, then, the following rule of *Elliott v. People,* 56 Colo. 236, 240, 138 P. 39, would apply:

> The general rule is that a defendant on trial for a crime shall not be prejudiced in the eyes of the jury by the admission of testimony tending to prove that he is guilty of another and distinct crime. This rule should be carefully observed by trial courts and district attorneys,

> in all cases where applicable. If, however, evidence is relevant to a material fact in issue in the case on trial, no valid reason exists for its exclusion because it may prove, or tend to prove, that the accused committed some other crime. * * * The authorities are quite uniform to the effect that when the guilt of a defendant depends upon the intent, purpose or design, with which an act was done, other transactions of a similar nature on his part may be examined into, for the purpose of establishing such guilty intent, design or purpose, although the facts thus elicited show the commission of another crime, provided such extraneous transactions are so connected as to time and so similar in their other relations that the same motive may be reasonably imputed to them all.

It is obvious that "intent" is of the essence of the offense of assault with intent to commit rape and must be proved by the prosecution like any other essential element. The same is true as to "attempt," for an attempt is "Any overt act done with the intent to commit a crime and which, but for the interference of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime. It consists of two important elements: first, an intent to commit the crime; and second, a direct ineffectual act done towards its commission." 14 Am. Jur., Criminal Law, §65.

In 2 Wigmore, Evidence (3d ed.), §357, in applying the Intent principle to rape, it is said:

> The Intent principle (ante, §303) clearly applies where the act is assumed as otherwise proved and the intent is in issue; i.e., in such cases, former acts of the kind are relevant to negative the intent as being of any other kind than to commit rape. (a) Where the charge is of assault with intent, the propriety of such evidence cannot be doubted. There should be some limitation of time, but merely to avoid the objection of unfair surprise (ante, §194). There need be no limitation as to the person assaulted, because the purpose is to negative any other than the rape intent, and a previous rape-assault on another woman has equal probative value for that purpose, for it is the general desire to satisfy lust that is involved in this crime, and no particular woman is essential to this. Accordingly, where the charge is assault with intent, former acts of the sort should be received without any limitation except as to time; though the courts can hardly be said to have accepted this result fully. (b) Where the charge is of rape, the doing of the act being disputed, it is perhaps still theoretically possible that the intent should be in issue; but practically, if the act is proved, there can be no real question as to intent; and, therefore, the Intent principle has no necessary

application. The former acts, if available at all, must be available under the Design principle.

The same view is taken in Wharton's Criminal Evidence (11th ed.), § 252, where it is said:

> Where intent and motive are in issue in sexual crimes, former acts of the same kind are relevant to show intent, and to negative the issue that another or different crime was contemplated or committed than that charged. Thus, in rape, circumstantial evidence showing prior acts is relevant where the prior acts are so connected with the particular crime at issue that the proof of one crime with its circumstances has some bearing upon the issue on trial, as showing the intent. Such evidence has a peculiar relevancy where the charge is assault with intent to commit rape, as in this case the act need not be limited to the person assaulted, for it is the general purpose that is involved in the assault, and no particular person is essential to show such purpose and motive, and such evidence is relevant to show the lustful intent.

The following authorities support the proposition that where intent is in issue, as in assault with intent to rape and inattempt to take indecent liberties, similar acts with persons other than the victim are admissible as showing intent: *McKenzie v. State,* 250 Ala. 178, 33 So. 2d 488; *Wilkins v. State,* 29 Ala. App. 349, 197 So. 75, 77-79, certiorari denied 240 Ala. 52, 197 So. 8; *Hearn v. State,* 206 Ark. 206, 174 S. W. 2d 452, 453; *Gerlach v. State,* (Ark.) 229 S. W. 2d 37, 40; *People v. Zabel,* 95 Cal. App. 2d 486, 213 P. 2d 60, 61; *People v. Cosby,* 137 Cal. App. 332, 31 P. 2d 218, 220; *State v. Dowell,* 47 Idaho 457, 276 P. 39; *State v. Sheets,* 127 Iowa 73, 102 N. W. 415, 416; *State v. Desmind,* 109 Iowa 72, 80 N. W. 214, 215; *State v. Cupit,* 189 La. 509, 179 So. 837, 839; *State v. Edwards,* 224 N. C. 527, 31 S. E. 2d 516.

SOME OF THE CASES IN POINT

In the discussion on pages 13 and 14 herein of *Dockerty v. People,* 74 Colo. 113, 115, 219 P. 220, it was pointed out that the supreme court there said: "Had there been an admission of the acts, with an attempt to explain or excuse them, the question of intent might have been presented." Just such a situation is shown in *People v. Zabel, supra,* 95 Cal. App. 2d 486, 213 P. 2d 60, 61, where it was said:

> "Defendant was convicted by a jury of a violation of Penal Code section 288 alleged to have been committed upon the person of an 11-year-old girl. The complaining witness testified that while she was sleeping in defendant's home with one of his stepdaughters defendant came into the room and placed his hand upon her genitals. Defendant denied this, his testimony being that he noticed the little girl uncovered and replaced the bed coverings

over her without touching the body. On cross-examination defendant stated that he might have touched her shoulder in placing the covers over her. Later, being shown a written statement previously given to the District Attorney, in which defendant had stated: "I was a little unsteady on my feet. I lost my balance. In putting my hand down to steady myself I came in contact with the * * * girl on her breast," he repeated: "I was a little unsteady on my feet and I might have touched her on the shoulder."

The tenor of defendant's testimony was that he might have touched the child's body but if he did so it was an accident and not done deliberately or with lustful intent.

This opened the door to the evidence of which defendant complains on appeal. The people produced in rebuttal the two stepdaughters of defendant who testified to recurring acts of intimacy committed by defendant on their persons, and also introduced his written statement in which defendant acknowledged similar acts with his stepdaughters. The trial court admitted this evidence for the limited purpose of showing the intent with which defendant touched the person of the complaining witness if the jury found that he did so, and the jury was explicitly instructed on the limited purpose for which this evidence should be considered.

The evidence was properly admitted under the rule that evidence of similar crime, while ordinarily not admissible, may be admitted to prove intent where there is an issue and the criminal intent is denied by the defendant. People v. Williams, 6 Cal. 2d 500, 58 P. 2d 917; People v. Westek, 31 Cal. 2d 459, 190 P. 2d 9; People v. James, 40 Cal. App. 2d 740, 105 P. 2d 947; People v. Clapp, 67 Cal. App. 2d 197, 153 P. 2d 758; People v. Collins, 80 Cal. App. 2d 526, 182 P. 2d 585. That defendant did not deny criminal intent in so many words is not important since such denial was implicit in his claim that if he touched the child his doing so was accidental; and the only conceivable purpose of this testimony was to negative a criminal intent.

The younger stepdaughter testified that defendant stopped his intimacies with her about two years before the trial. The question whether this evidence was too remote was primarily for the trial judge and we cannot hold its admission error, particularly in view of the fact that the other stepdaughter testified to continuing intimacies up to the time of the offense of which defendant is accused.

In *State v. Edwards, supra,* 224 N. C. 527, 31 S. E. 2d 516, defendant was convicted of attempt at incest and attempt to have

carnal knowledge of his 14-year-old daughter. It was decided that evidence was properly admitted that within the preceding three years defendant had made similar improper advances to an older daughter, the court saying:

> Here, in addition to evidence of incestuous attempts upon the person of the State's witness by her father, it was competent for the State to offer evidence tending to prove similar attempts and advances to another daughter for the purpose of showing the intent as well as the unnatural lust of the defendant in attempting to commit the crimes charged in the bills of indictment. Intent is one of the elements necessary to sustain a charge of an attempt to commit a criminal offense.

In *State v. Cupit, supra,* 189 La. 509, 179 So. 837, 838, defendant was charged with assault to commit rape upon his 14-year-old niece. The appellate court held that the trial court had properly admitted, for its bearing on the issue of intent, evidence that eight years before defendant had raped another niece. It was said: "It is true that there is a considerable separation of time between the commission of the offense charged in this case and the commission of the prior offenses, but that fact itself is not sufficient to exclude the evidence of the prior offenses. All the offenses are not only similar, but also they are so related in kind that the evidence of the prior offenses clearly served to illustrate the question of defendant's intent as to the present offense. * * * Under the circumstances of this case, the difference in time between the offenses is more appropriate to the weight of the evidence than to its admissibility."

Hearn v. State, supra, 206 Ark. 206, 174 S. W. 2d 452, also is a case of assault with intent to rape. There, defendant accosted a young girl at night, seized her and attempted to choke her. "The prosecuting witness did not testify as to what the appellant said, or as to any other act that he did which would make this a case of assault with intent to commit rape as distinguished from an assault with intent to commit some other crime, as for instance an assault with intent to rob. As evidence of assault with intent to commit rape, the State was allowed to show two other acts of misconduct by the defendant, both of a sexual nature. (1) One witness (a woman) testified that about two months before the act here involved, the appellant had torn the screen window open in the kitchen and come into the house of the witness and awakened her, feeling of her, and then got into bed with her before she discovered it was not her husband; that the appellant had grabbed her and started to twist her leg, and she screamed and the appellant ran. (2) Then another witness (a man) testified that about two months before the act involved in this case, the said witness had seen the appellant one night peeping in the window of the home of the witness' brother; and the witness had taken the appellant to the officers for that offense." The appel-

late court held that such evidence was properly admitted as bearing on the specific intent with which the defendant had made the assault charged.

WHEN CROSS-EXAMINATION PROPER

Where criminal intent is in issue and the effect of defendant's testimony is that he acted in good faith, he may be cross-examined as to similar offenses. *Todd v. People,* 82 Colo. 541, 549, 261 P. 661.

EVIDENCE PROPER IN REBUTTAL

Where the defendant's excuses for or explanation of his acts are tantamount to a denial of criminal intent, he may be cross-examined as to them, and then evidence of similar sex offenses against others than the immediate victim may be shown in rebuttal. These principles are carefully analyzed and applied in *People v. Westek,* 31 Colo. 2d 469, 190 P. 2d 9, 13-16. See also *People v. Knight,* 62 Cal. App. 143, 216 P. 96, 97; *People v. Harrison,* 46 Cal. App. 2d 779, 117 P. 2d 19, 23; *People v. Goff,* 100 Cal. App. 2d 166, 223 P. 2d 27, 30; and see the same principle in *Cook v. State,* 155 Ark. 106, 244 S. W. 735, 736.

ILLUSTRATIVE COLORADO CASES UNDER EXCEPTION 1

Guilty Knowledge: Bruno v. People, 67 Colo. 146, 149, 186 P. 718; *Goodfellow v. People,* 75 Colo. 243, 246, 224 P. 1051; *Whitfield v. People,* 79 Colo. 108, 115, 244 P. 470; *Helser v. People,* 100 Colo. 371, 391, 68 P. 2d 543; *Grandbouche v. People,* 104 Colo. 175, 187, 89 P. 2d 577.

Intent or Malice: Warford v. People, 43 Colo. 107, 112, 96 P. 556; *Clark v. People,* 53 Colo. 214, 216, 125 P. 113; *Elliott v. People,* 56 Colo. 236, 238-240, 138 P. 39; *Tracy v. People,* 65 Colo. 226, 233, 176 P. 280; *Max v. People,* 78 Colo. 178, 181-182, 240 P. 679; *Whitfield v. People,* 79 Colo. 108, 115, 244 P. 470; *Reppin v. People,* 95 Colo. 192, 210, 34 P. 2d 71; *Helser v. People,* 100 Colo. 371, 390-391, 68 P. 2d 543; *Smaldone v. People,* 103 Colo. 498, 507-508, 88 P. 2d 103; *Grandbouche v. People,* 104 Colo. 175, 187, 89 P. 2d 577; *Rogers v. People,* 104 Colo. 594, 602, 94 P. 2d 594; *Clark v. People,* 105 Colo. 335, 338, 97 P. 2d 440; *Paine v. People,* 106 Colo. 258, 265, 103 P. 2d 686; *Peiffer v. People,* 106 Colo. 533, 538-539, 107 P. 2d 799; *Montez v. People,* 110 Colo. 208, 221, 132 P. 2nd 970; *Jones v. People,* 118 Colo. 271, 277, 195 P. 2d 380.

Motive: Warford v. People, 43 Colo. 107, 112, 96 P. 556; *Myers v. People,* 65 Colo. 450, 454, 177 P. 145; *Bruno v. People,* 67 Colo. 146, 149, 186 P. 718; *Whitfield v. People,* 79 Colo. 108, 115, 244 P. 470; *Reppin v. People,* 95 Colo. 192, 210, 34 P. 2d 71; *Helser v. People,* 100 Colo. 371, 390, 68 P. 2d 543; *Smaldone v. People,* 103 Colo. 498, 507-508; *Bacino v. People,* 104 Colo. 229, 233, 90 P. 2d 5; *Grandbouche v. People,* 104 Colo. 175, 187, 89 P. 2d 577; *Coates v. People,* 106 Colo. 483, 487-488, 106 P. 2d 354.

Plan or System: Elliott v. People, 56 Colo. 236, 239-240, 138 P. 39; *Castner v. People,* 67 Colo. 327, 330, 184 P. 387; *Voris v. People,* 75 Colo. 574, 577, 227 P. 551; *Max v. People,* 78 Colo. 178,

180-181, 240 P. 679; *Webb v. People,* 97 Colo. 262, 49 P. 2d 381; *Helser v. People,* 100 Colo. 371, 391, 68 P. 2d 543; *Thorp v. People,* 110 Colo. 7, 11, 129 P. 2d 296; *Torbert v. People,* 113 Colo. 294, 302, 156 P. 2d 128; *Perry v. People,* 116 Colo. 440, 445, 181 P. 2d 439; *Chasse v. People,* 119 Colo. 160, 163, 201 P. 2d 378.

Identity: Williams v. People, 114 Colo. 207, 213, 158 P. 2d 447; and see notes in 3 A. L. R. 1540, 22 A. L. R. 1016, 27 A. L. R. 357 and 63 A. L. R. 602.

IN VARIOUS CRIMES

Abortion: Max v. People, 78 Colo. 178, 181-182, 240 P. 679; *Ferguson v. People,* 118 Colo. 54, 56, 192 P. 2d 523.

Assault: Warford v. People, 43 Colo. 107, 112, 96 P. 556.

Burglary: Longwell v. People, 95 Colo. 403, 405, 36 P. 2d 458; *Perry v. People,* 116 Colo. 440, 445, 181 P. 2d 439; *Wolff v. People,* 123 Colo. 487, 230 P. 2d 581, 583.

Confidence Game: Elliott v. People, 56 Colo. 236, 239-240, 138 P. 39; *Roll v. People,* 78 Colo. 589, 594, 243 P. 641; *Todd v. People,* 82 Colo. 541, 261 P. 661; *Grandbouche v. People,* 104 Colo. 175, 186, 89 P. 2d 573; *Peiffer v. People,* 106 Colo. 533, 538-539, 107 P. 2d 799; *Chasse v. People,* 119 Colo. 160, 163, 201 P. 2d. 378.

Conspiracy: Hamilton v. People, 87 Colo. 307, 310, 287 P. 651; *Helser v. People,* 100 Colo. 371, 390-391, 68 P. 2d 543; *Smaldone v. People,* 103 Colo. 498, 508, 88 P. 2d 103; *Grandbouche v. People,* 104 Colo. 175, 186, 89 P. 2d 573; *Jones v. People,* 118 Colo. 271, 276-277, 195 P. 2d 380.

Embezzlement: Clark v. People, 105 Colo. 335, 338, 97 P. 2d 440; *Thorp v. People,* 110 Colo. 7, 11, 129 P. 2d 296.

False Pretenses: Housh v. People, 24 Colo. 262, 50 P. 1036; *Clarke v. People,* 53 Colo. 214, 216, 125 P. 113; *Tracy v. People,* 65 Colo. 226, 233, 176 P. 280; *Whitfield v. People,* 79 Colo. 108, 115, 244 P. 470; *Montez v. People,* 110 Colo. 208, 221, 132 P. 2d 970.

Gambling: Chase v. People, 2 Colo. 509, 514.

Homicide: Hillen v. People, 59 Colo. 280, 282, 149 P. 250; *Reppin v. People,* 95 Colo. 192, 210, 34 P. 2d 71; *Coates v. People,* 106 Colo. 483, 487-488, 106 P. 2d 354; *Williams v. People,* 114 Colo. 207, 212, 158 P. 2d 447; *Schneider v. People,* 118 Colo. 543, 552-559, 199 P. 2d 873.

Larceny: Bush v. People, 68 Colo. 75, 80, 187 P. 528; *Bacino v. People,* 104 Colo. 229, 233, 90 P. 2d 5; *Clark v. People,* 105 Colo. 335, 338, 97 P. 2d 440; *Perry v. People,* 116 Colo. 440, 445, 189 P. 2d 439.

Receiving Stolen Goods: Myers v. People, 65 Colo. 450, 453-454, 177 P. 145; *Castner v. People,* 67 Colo. 327, 330, 184 P. 387; *Bush v. People,* 68 Colo. 75, 80, 187 P. 528; *Goodfellow v. People,* 75 Colo. 243, 246, 224 P. 1051; *Burnham v. People,* 104 Colo. 472, 475-476, 93 P. 2d 899.

Robbery: Voris v. People, 75 Colo. 574, 577, 227 P. 551.

Short Checks: Rogers v. People, 76 Colo. 181, 182, 230 P. 391; *Chasse v. People,* 119 Colo. 160, 163, 201 P. 2d 378.

RES GESTAE IN COLORADO

ARTHUR BURKE AND ARTHUR FRAZIN*

A learned chief justice once remarked, "there are few problems in the law of evidence more unsolved than what things are to be embraced in those occurrences that are designated in the law as the *res gestae*." [1] While this is true, it need not be so of necessity.

The term "res gestae" has been defined as "things done; transactions; essential circumstances surrounding the subject. The circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character." [2]

There is perhaps no state which considers res gestae in as broad a sense as does Colorado. Professor Wigmore suggests that res gestae be confined to spontaneous declarations. Most other text writers admit the existence of verbal acts within the doctrine of res gestae, whereas, few writers recognize the third category, referred to here as contemporaneous acts, which Colorado adopts as part of the res gestae. The wisdom of this third category will not here be questioned, rather the sole issue to be considered will be the law of res gestae as actually applied in the Colorado courts.

The three segments to be considered then are contemporaneous acts, verbal acts, and spontaneous declarations. They will be considered in that order.

The category of contemporaneous acts, while not recognized by text writers, is easy of definition and comprehension. It is a doctrine of necessity. There is no basis under the hearsay rule for excluding testimony concerning these acts. The only objection to the admission of a contemporaneous act in evidence is that it may include an offense other than that for which the defendant is on trial. It is here that the doctrine of necessity applies. If the act which is in issue can be separated from an act about which testimony would be objectionable then, of course, this should be done, and the objectionable testimony should be excluded. When this separation is impossible, Colorado courts have consistently held evidence of these "secondary" acts to be admissible as a part of the res gestae. It would seem from the definition above that the courts may so do. In *Pearson v. People*,[3] the court admitted as part of the res gestae, evidence surrounding defendant's arrest, taking of arms from him, and the like.

In *Piela v. People*,[4] it appeared that, during an affray, defendant who was indicted for assaulting A with intent to murder, also assaulted B. The assault upon B was held to be a part of the res

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[1] Beasley, C. Jim, Hunter v. State, 40 N.J. L. 536.

[2] Black's Law Dictionary, 3rd ed., p. 1539.

[3] Pearson v. People, 69 Colo. 76, 168 P. 155 (1917).

[4] Piela v. People, 6 Colo. 343 (1882).

gestae, and the court said that the conviction under the indictment would not be set aside because the witness, in describing the affray, spoke of the assault upon B. In *Garcia v. People*,[5] evidence was admitted, as part of the res gestae, showing that the defendant had committed an assault upon another and while trying to escape, killed the deceased (for whose murder he was being tried) while resisting arrest. As can be seen by these cases, the question raised by the court when considering admissibility is whether the act, about which testimony is attempted to be introduced, is a part of the transaction in issue. While the wisdom of calling this a part of the res gestae may be questioned by many, it is well established in Colorado that such acts must be considered as within the res gestae.

Verbal acts are utterances which accompany some act or conduct to which it is desired to give a legal effect. When an act has intrinsically no definite legal significance, or is ambiguous, its legal purport or tenor may be ascertained by considering the words accompanying it. These utterances thus enter as a verbal act. The use of utterances as verbal acts has four limitations:[6] (a) The conduct to be characterized by these words must be material to the issue; (b) it must be equivocal in its nature; (c) the words must aid in giving legal significance to the conduct; and (d) the words must accompany the conduct.

A spontaneous exclamation may be defined as a statement or exclamation made immediately after some exciting occasion by a participant or spectator, asserting the circumstances of that occasion as it is observed by him. The admissibility of such an exclamation is based on the experience that, under certain external circumstances of physical or mental shock, a stress of nervous excitement may be produced in a spectator which stills the reflective faculties and removes control. The utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, rather than reason and reflection, and during the brief period when consideration of self-interest could not have been fully brought to bear, the utterance may be taken as expressing the real belief of the speaker as to the facts just observed by him.[7]

The confusion arises when the courts speak of res gestae as embodying but one logic, whereas in reality all of the above three segments mentioned have as a basis a different logical principle.

The logic behind the contemporaneous act is that if the court is to reach the truth of the matter asserted, it is sometimes necessary to testify to an act which is closely connected with the main act. This evidence concerning a contemporaneous act is admitted

[5] Garcia v. People, 59 Colo. 434, 149 P. 614 (1915).
[6] Wigmore Evidence, § 1772 (2d ed.).
[7] *Id.* at § 1747.

through the doctrine of necessity, not as substantive evidence, but as an act so closely connected with the main act that it is impossible to separate the two. These acts do not come under the hearsay rule as an exception because they are not hearsay evidence. In *Garcia v. People, supra,* an example is given in which the court stated that, "evidence that the defendant had been ejected from a hotel and stabbed the person who ejected him, was relevant as part of the res gestae on prosecution for killing the officer who attempted to arrest him." As shown by the court, these acts were so closely connected as to be impossible of separation.

As to verbal acts, there should be no objection to their admission because, as shown by the definition, they are not hearsay but are merely a verbal phrase with accompanies and gives a legal significance to the equivocal act. In the case of *Pickens v. Davis,*[8] the testatrix had made statements to the effect that when she cancelled her second will, the first will was not revived. It was held that these statements were verbal acts accompanying and explaining the equivocal act of revocation.[9]

Spontaneous declarations are true hearsay statements. They are introduced to prove the truth of the matter asserted. They are extra-judicial statements, not under oath, and with no opportunity to cross examine. Furthermore, the declarant is often not in court. Spontaneous declarations are admitted because the circumstances under which they are made indicate that they may be believed. The logic behind the admission of these statements is based on common sense. In the experience of men, there are events which are so shocking that an utterance spontaneously made while still under the influence of this event (and about this event) are to be given evidentiary value because of the likelihood of truth. These are proper exceptions to the hearsay rule.

Colorado does not clearly distinguish between these three segments of res gestae. For instance, in the case of *Martinez v. People,*[10] the court said, "res gestae may be defined as matter incidental to the main fact and explanatory thereof, including acts and words so closely connected therewith as to constitute a part of it; the circumstances, facts, and declarations, which spring out of the main fact, are contemporaneous with it, and serve to illustrate its character." This is typical of the Colorado construction of the rule. There is no allowance made for the difference in logic underlying the three segments mentioned. In the case of *Industrial Comm. v. Fotis,*[11] the court further states that "res gestae, while often spoken of as an exception to the hearsay rule, is generally not such in fact but ordinarily it relates to statements which because of their intimate relation to facts become a part of those

[8] Pickins v. Davis, 134 Mass. 257.

[9] See also for examples of verbal acts the following Colorado cases: Sharp v. McIntire, 23 Colo. 99, 46 P. 115 (1896); Wilcoxen v. Morgan, 2 Colo. 473 (1875); Wilson v. Birt, 77 Colo. 206, 235 P. 563 (1925).

[10] 55 Colo. 51, 132 P. 64 (1913).

[11] 112 Colo. 423, 149 P. 2d 657 (1944).

facts and are therefore admitted as such." Is the reference here to spontaneous declarations, verbal acts, or contemporaneous acts?

Further the supreme court, in the recent Colorado case of *Stahl v. Cooper*,[12] states: "Res gestae are events speaking for themselves, through the instinctive words or acts of participants, not the words or acts of participants when narrating the events, and what is done or said by participants under the immediate *spur* of a transaction becomes thus part of the transaction, because it is then the transaction that speaks." This could encompass either or both verbal acts and spontaneous declarations. The court further states, "A statement, if part of the res gestae, must be in the nature of an exclamation rather than an explanation, and must be spontaneous and instinctive rather than deliberate." This, while an excellent statement of a spontaneous declaration, is not definitive of a verbal act. If the courts were to follow the latter statement and apply it to verbal acts as part of the res gestae, this would necessarily limit the admission of verbal acts. Yet, in this same case, the supreme court stated, "The tendency is to broaden, rather than to restrict, the res gestae rule."

Colorado courts have taken the generally accepted two segments of res gestae and added a third which we have called "contemporaneous acts." These are all truly a part of the transaction. Spontaneous declarations are exceptions to the hearsay rule; verbal acts and contemporaneous acts are not within this rule. This is the only point of difficulty. It is necessary for the Colorado practitioner to keep constantly in mind the difference in logic underlying the admission of the three. The danger inherent in res gestae lies in trying to apply the same logic to all segments. This is, of course, impractical. Spontaneous declarations are admitted because the circumstances under which they are made point up the probability of their truth; verbal acts are admitted because they are not considered statements (and therefore cannot be hearsay), but as a part of the act which they explain; contemporaneous acts are not hearsay because they are not statements and are admitted (if objected to on other grounds) because it is impossible to testify to the main fact without talking about these acts also.

There is no reason why these three segments of res gestae should not exist side by side. With a thorough understanding of all three, the doctrine of res gestae can go on serving the ends of justice.

BOOK TRADERS CORNER

Volumes 1 through 55 of Corpus Juris Secundum and volumes 1 through 239 of the Pacific Reports, second series, are offered for sale by Attorney John B. Barnard of Granby, Colorado. Mr. Barnard informs us that he might be interested in trading these for other volumes needed for his library.

[12] 117 Colo. 468, 190 P. 2d 891 (1948).

REAL EVIDENCE IN CRIMINAL LAW

ALBERT BRENMAN AND ROBERT ROSNIK*

Demonstrative or real evidence is evidence addressed directly to the senses without the intervention of witnesses, as by actual sight, hearing, or taste. In criminal law such evidence is inadmissible if it explains no fact and is not relevant to any disputed issue. Models, casts, and other reproductions of relevant objects may be used to illustrate oral testimony.[1] In this article an attempt will be made to point out various types of real evidence that the Colorado Supreme Court has held admissible.

REAL EVIDENCE WHICH FORMS PART OF THE TRANSACTION

Articles which form a part of the transaction or which serve to unfold or explain it may be accepted in evidence if they are properly identified and are in substantially the same condition as at the time of the offense.

In *Cliff v. People*[2] where the defendant, a bank president, was being prosecuted for embezzlement, certain bank books and memoranda were admitted over the defendant's objection that they were not in defendant's handwriting and were not shown to have been made under defendant's direction or with his knowledge. The supreme court held that such direction and knowledge need not be proved by direct evidence, circumstantial evidence being sufficient. Here the bank was small, the president was in direct control and there was an unavoidable inference that all book entries and memos were made with defendant's knowledge and direction.

In *Trujillo v. People*,[3] the defendant was charged with failure to provide support for an illegitimate child of the complaining witness. The court was confronted with the admissibility of a hotel register which the defendant acknowledged signing on three separate occasions, claiming that on those occasions he was at the hotel with a woman other than the complainant. The register was admitted in evidence after being identified by the husband of the owner of the hotel even though such witness had not seen the defendant sign it. The supreme court sustained the trial court's ruling admitting the register in evidence, for not only did the complainant identify defendant's signature, but on cross-examination the defendant admitted signing the book. The register merely corroborated the testimony of the parties.

PROPERTY OF THE ACCUSED

Property of the accused which is sufficiently identified and shown to belong to the accused or to have come from his possession, and which throws light upon the crime or serves to connect the accused with it, is admissible. The accused may be permitted to introduce property belonging to him to impeach the prosecu-

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[1] 22 C.J.S. 1201 § 708.

[2] 84 Colo. 254, 269 P. 907 (1928).

[3] 122 Colo. 436, 222 P. 2d 775 (1950).

tion's witness. In *Wolf v. People*[4] where the defendant was charged with burglary with force, burglary without force, and receiving stolen goods, evidence consisting of articles identified as stolen from the premises were held admissible by the Colorado court. These articles were recovered by police either in the apartment occupied by defendant and his wife, in the shop of defendant, or otherwise definitely proven to have been in his possession shortly after the buglary in question.

The defendants in *Rude v. United States*[5] were charged with false advertising through the mails with intent to defraud. The court allowed in evidence a suit purchased by a post office inspector which was advertised as an unclaimed $5 suit but which turned out to be a regular stock suit.

In a suit for divorce on the grounds that the wife shot at her husband, there was admitted into evidence a pistol, alleged to have been used by the wife, and a coat worn by the plaintiff through which the bullet was alleged to have passed.[6] It was said to be within the discretion of the trial court to allow the jury to have the pistol and coat in the jury room during their deliberations. The supreme court said that the trial court's discretion will not be interfered with in the absence of manifest abuse. The court further stated that it was proper that the objects to which testimony relates should be brought into court and exhibited, when this can be done. This was said to be more satisfactory than a description of such evidence by witnesses who have inspected it outside of court.

In a case in which the defendants were charged with conspiracy to commit arson and consipracy to burn a house to defraud the insurers, a valise and a bundle of letters addressed to the husband of the owner of the house were admitted in evidence to show knowledge and preparation for the crime. The sole purpose of admitting this evidence was to show that the owner of the house, a defendant, was expecting the house to burn, and therefore, articles such as these would naturally have been removed by him.[7]

PROPERTY OF THE VICTIM

Property of the injured or killed party found at the scene of the crime or accident, in or about the defendant's possession, or elsewhere, is admissible in evidence. For example, in a prosecution for homicide, the deceased's bloodstained clothing was admitted over the defendant's objection the defendant stating that the exhibition was unnecessary and was calculated to, and did, arouse the passions of the jurors and sway their judgment. The court held, on appeal, that if evidence is competent, relevant, and material as this evidence was, it should not be rejected because it brings vividly to the jury the details of a shocking crime. This,

[4] 123 Colo. 487, 230 P. 2d 581 (1951).
[5] 74 Fed. 2d 673 (1935).
[6] Fowler v. Fowler, 63 Colo. 451, 168 P. 648 (1917).
[7] Mukuri v. People, 92 Colo. 306, 19 P. 2d 1040 (1933).

the court said is the lawful purpose of evidence. Such holding is in accord with the general rule that although the introduction of real evidence may incite the jury, it may be admitted as long as it illustrates and makes clear the issue of the case.[8]

In an early federal case [9] where the problem of admitting demonstrative evidence arose, the court held that clothing worn by deceased at the time of the accident is admissible for the purpose of identifying the deceased and establishing the nature and extent of the injuries. A later case,[10] held that there was no error in admitting in evidence burned shoes worn by decedent when death occurred from contact with a high tension wire. The shoes were admitted to support the plaintiff's theory that the decedent slipped on the roof of a house and came in contact with the wires. This evidence tended to show how the accident came about because of marks of paint and striations on the shoes. The court stated that the plaintiff had a right to prove his theory, and such evidence ought not to be rejected unless it clearly has no tendency to prove or disprove relevant facts.

INSTRUMENTS OF THE CRIME

Weapons, instruments, and articles identified as the means by which a crime was committed are admissible, provided they are substantially in the same condition as at the time of the offense. In *Brown v. People* [11] the defendant was charged with statutory rape. The evidence introduced was a prophylactic wrapper which the sheriff had found the next morning when he searched the automobile in which the alleged offense was committed. This substantiated the victim's statement that the defendant made use of a contraceptive. Likewise, in a case where the defendant was charged with burglary and the possession of burglary tools, a tire iron and other tools, which were not intrinsically burglary tools, were properly admitted to show possession of burglary tools, a separate crime, after the jury had found the defendant guilty of the crime of burglary. The only objection of the defendant was that he should not have been convicted of the burglary because of lack of sufficient identification, which issue was resolved against him.[12]

In an abortion case [13] where the defendant was found and arrested while attending the prosecuting witness, it was held proper to admit in evidence the tools used in the abortion, which consisted of a bottle containing white pills and other pills in yellow cellophane both trade-marked "HR", a dark fluid in a bottle, a metal piece with a rubber hose attached thereto, a grease gun, and a speculum.

[8] Moya v. People, 88 Colo. 139, 293 P. 335 (1930).
[9] Baggs v. Martin, 108 Fed. 33, 44 C.C.A. 175 (1901).
[10] Southern Colo. Power Co. v. Pestano, 80 Colo. 375, 251 P. 224 (1926).
[11] 120 Colo. 493, 210 P. 2d 837 (1949).
[12] Smalley v. People, 116 Colo. 598, 183 P. 2d 558 (1947).
[13] Montgomery v. People, 117 Colo. 118, 184 P. 2d 480 (1947).

CLOTHING OF THE ACCUSED

Articles of clothing belonging to or connected with the accused and sufficiently identified and connected with the crime are admissible when they tend to throw light on a material inquiry and are in substantially the some condition as at the time of the offense. Thus in *Burnham v. People* [14] where the defendant was convicted of receiving stolen goods, the court said that clothing other than that found in defendant's possession but part of the stock of merchandise stolen from the same store in the same transaction was admissible to show that the clothing he did have in his possession had been stolen. This is illustrative of an exception to the rule that evidence of other crimes is not admissible against the defendant. Evidence of thefts of other goods from the same owner by the same thief is admissible where it is connected with the same transaction.

LIQUOR

Liquors and related articles identified as having been in the possession of the accused or otherwise connected with him are admissible, provided there has been no substantial change in their condition. In *Enyart v. People*,[15] the Colorado court held that where defendant was charged with violation of the Prohibition Act it was proper for the jury to look at and smell of the liquor alleged to be intoxicating for the purpose of determining its character.

PEOPLE AS REAL EVIDENCE

In general the jury may view the injured person to see his scars and wounds if they tend to solve or are material to a controverted issue. This admission is competent even when it shows horrible consequences of an assault. However, a connection must be shown with the crime committed. For the purpose of showing the fact of a birth of a child, where such fact is material, the admission of the child is competent; but when the paternity is in question, the authorities are divided on the child's admissibility to show the resemblance of the child to its putative father. A search failed to reveal a pertinent Colorado case on the subject.

DEMONSTRATIONS

Demonstrations to illustrate matters in issue may be permitted in the court's discretion. In an automobile negligence case, *Small v. Clark*,[16] toy automobiles and maps of the scene, both drawn and built to scale, were held admissible. These were for illustrative purposes in connection with the testimony.

PHOTOGRAPHS

Photographs, though not considered demonstrative evidence are very closely related thereto, and for that reason are mentioned here. In a recent Colorado case, the defendant assaulted his wife and threw her down steep basement steps. The next morning he

[14] 104 Colo. 472, 93 P. 2d 899 (1939).
[15] 70 Colo. 362, 201 P. 564 (1921).
[16] 83 Colo. 211, 263 P. 933 (1928).

found her body at the bottom of the steps. He buried her in the cellar. Photographs were admitted of the decomposed body of the victim. The court held these admissible, saying,[17]

> Photographs are the pictured expressions of data, observed by a witness. They are often more accurate than any description by words, and give clearer comprehension of the physical facts than can be obtained from testimony of witnesses. Ordinarily, photographs are competent evidence of anything which it is competent for a witness to described in words. Their admissibility does not depend upon whether the objects they portray could be described in words, but on whether it would be helpful to permit the witness to supplement his description by their use. They are not inadmissible because they bring vividly to the jurors, the details of a shocking crime, or tend to arouse passion or prejudice. It is only when photographs do not illustrate or make clear some issue of the case and are of such a character as to prejudice the jury, that they are not admissible. Its admission rests largely in the discretion of the trial judge, and his decision will not be disturbed on review unless an abuse of discretion is shown.

CONCLUSION

Demonstrative evidence is the most clear cut and convincing type of evidence which may be brought before a court. A search of the Colorado cases does not reveal an instance where the supreme court has overruled the trial court's discretion in admitting evidence of this type. As long as the articles admitted are connected in some manner to the case, and tend to shed light on motive, means, or manner of the act or crime, their admissibility will be sustained, even though such admission might inflame or enrage the jurors to prejudice.

Wigmore has aptly expressed the general consensus in regard to this matter as follows:[18]

> It seems too rigorous to forbid a party to prove his case by the clearest evidence, and a jury which through violent prejudice would not be restrained by the court's instructions would probably give way to its prejudice even without this evidence. The courts impose no prohibition except so far as the discretion of the trial courts may prevent abuses.

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[17] Potts v. People, 114 Colo. 253, 158 P. 2d 739 (1945). *See* also Carson v. People, 93 Colo. 478, 26 P. 2d 1068 (1933); Rowan v. People, 93 Colo. 473, 26 P. 2d 1066 (1933); Mow v. People, 31 Colo. 351, 72 P. 1069 (1903); Moya v. People, 88 Colo. 139, 293 P. 335 (1930); King v. People, 87 Colo. 11, 285 P. 157 (1930); De Salvo v. People, 98 Colo. 368, 56 P. 2d 28 (1938); Millitella v. People, 95 Colo. 519, 37 P. 2d 527 (1934); Maynes v. People, 110 Colo. 149, 200 P. 2d 915 (148).

[18] Wigmore on Evidence, § 1158, p. 259 (3d ed.)

THE DEFENDANT AS A WITNESS

KENNETH W. ROBINSON
of the Denver Bar

In the ordinary case, the defendant will take the stand as a matter of course. After all he stands charged with crime. He has plead not guilty. The State has presented its evidence. The motion for directed verdict has been overruled. And the jury properly wants to hear his story.

If the defendant does not testify, there must be the most compelling of reasons. Obviously, no lawyer will assume that the presumption of innocence and the instruction upon failure to testify will satisfy the natural feeling of the jury and of us all that an innocent man will be anxious to present his defense in person on the stand. And unfavorable inferences likely will be drawn when he elects not to do so.

Occasionally, however, serious questions arise in our minds whether more harm than good will be done by offering our client as a witness. Unfortunately, there are no books to guide us; there are no precedents to be examined. We must trust alone to whatever inate ability we have to gauge the situation at hand and to appraise the overall picture and pray for a large measure of good luck.

This question generally grows out of one or more of the following situations which may confront us at the end of the State's case.

First: Will the defendant's testimony supply some proof missing from the State's case, and which we believe to be vital before conviction can be had?

Second: Will our client's cross-examination probably reveal guilt of other offenses? These may be offenses of which he presently stands charged or which will result in the bringing of additional charges.

Third: Is the personality of our client such that he will make a very unimpressive witness who may convict himself?

Fourth: Has he a criminal record?

As to the first, unless we are satisfied in our own minds that the State has actually failed to prove its case and that an appellate court will so hold, it is submitted the defendant better take the stand. For experience cautions us not to rely too heavily in the reviewing court upon technicalities. As one former Judge used to say: What he was interested in was doing substantial justice. And if the appellate court feels substantial justice has been done, it will not look for technical reasons to reverse.

As to the second, certainly we do not want to find ourselves in a position where a careful and thorough cross-examination of our client will prove that he is guilty of other offenses as well as the one presently on trial. Perhaps here it would be better to rely upon the weakness of the State's case, presumption of in-

nocence and the court's instruction that the failure to testify is no evidence of guilt.

As to the third, the fact that our client does not appear to us as a man of impressive personality, or that he will make a "good" witness should not keep us from remembering at all times that this is his day in court and it is he who may have to serve many years upon conviction. It seems reasonable to believe that if he is convicted there will be many nights and days in the penitentiary when he will wonder why he did not testify. It is well to remember that an acquitted man generally believes it was because of his own sagacity; a convicted one knows it was the fault of his lawyer.

Perhaps it is the fourth of the situations outlined, our client's former criminal record, that causes us the most trouble in determining whether he should testify. We realize, of course, that unless he takes the stand, the jury will not be advised of his former record. If he does testify, that fact will be known. What shall we do about it? There is no answer which will apply to all cases. There is no formula by which we can resolve the question. We must sense the state of the case and the feeling in the court room, which is probably reflected in the jury box, to determine whether it is necessary to risk the development of this information.

One or two considerations may help us in trying to decide. What was the nature of the former conviction? How long ago was it? Does our client's record contain other convictions as well, or is it only one? If his record, shall we say, is that of involuntary manslaughter some years ago and he is now on trial for some business offense, embezzlement, falsification of records, et cetera, and the State's case against him is strong, it would seem probably the part of wisdom to put him on the witness stand. If, however, our client once before has served a term for embezzlement, and is again on trial for embezzlement, and we have other evidence apart from his testimony which can be produced to counteract the State's case at least in part, perhaps it is well not to put the defendant on the stand, but to rely on the inherent weakness of the State's case plus such evidence apart from the defendant's testimony as we can muster.

If he does testify, you will, of course, want to bring out his former convictions yourself. You will not want to wait for cross-examination to develop this. I am sure we are all in agreement from the standpoint of trial tactics that if there is something damaging, and you know it will be brought out from the witness, it is best to bring it out yourself in the course of your own examination.

There is no easy solution. It has always seemed, however, in the last analysis the defendant should take the witness stand and should testify unless, as noted, there are overwhelming reasons why he should not. If, after careful consideration, you still are in doubt, it is recommended that the defendant take the stand.

And if he does not take the stand, by all means have him give you a note in his own handwriting, stating it is his view, as well as yours, that he should not testify and requesting you not to call him as a witness. If he has a wife, she should approve in writing this note. The advisability of such precaution was impressed upon me as a prosecutor in the '20's. In a serious case, involving the failure of a bank in Denver,* the defendant on trial did not take the stand. After his conviction, he charged his lawyers with many derelictions, among them, their refusal to let him testify. They were able and experienced trial lawyers. These lawyers presented to the District Court a letter signed by the defendant stating that his position was that he should not take the witness stand. Without that letter it might have been very embarrassing.

Frankly, I am afraid this last suggestion, always to take a letter from the defendant if he does not testify, is about all that may have been contributed by this discussion.

Whatever your decision, you never can be satisfied you were right or just lucky.

CASE COMMENTS

CONSTITUTIONAL LAW—THE SANCTITY OF A LEGISLATIVE ACT IS SUPERIOR TO THAT OF THE LEGISLATURE ITSELF—WHAT AMOUNTS TO AN EFFECTIVE REPEAL?—Plaintiffs brought action to recover a judgment for treble damages allegedly due them by reason of the defendant's having collected interest on a loan in excess of that allowed under chapter 108 Session Laws of Colorado, 1913. The defendant demonstrated that chapter 157, Session Laws of Colorado, 1935, stated that the 1913 Act was repealed; that the compilers of the 1935 Colorado Statutes Annotated thereafter omitted the 1913 Act from their compilation; that the State Banking Commissioner discontinued enforcing the provisions of the 1913 Act in reliance of the 1935 Act; and that loan companies generally considered the 1913 Act repealed. On defendant's motion the case was dismissed with prejudice, and the plaintiffs appealed. On May 12, 1952, the Supreme Court of Colorado reversed the decision of the trial court, declaring that the 1913 Act had not been effectively repealed by the 1935 Act insofar as loans over $300 were concerned since the 1935 Act by its title was confined to loans of $300 or less. This despite the fact that the body of the 1935 Act "repealed" the former Act. (*Sullivan v. Siegal,* ..... Colo. ....., ... P. .....) (1952.)

Speaking through Mr. Justice Alter, the court held that the

* Mandell v. People, 76 Colo. 296.

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repealing clause of the 1935 Act was unconstitutional as violative of section 21, Article V of the Colorado Constitution. That section provides, "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." The court dismissed in summary fashion the argument based on the fact that the administrative official and the loan companies had considered the law repealed. In a similar summary fashion, and with some disdain, the court dismissed the argument that exclusion from a compilation of laws operated as a repeal of the law thus excluded, stated that such compilations were only *prima facie* the existing law. The court even expressed doubts as to the validity of the delegation of authority which might be necessary if such compilations were to be regarded on the higher plane and dignity of a basic and fundamental law.

A Case Comment is a beautifully expeditious kind of literary expression. It enables the writer to criticize, to laud, to prophesy or to simply communicate an impression. The writers of this comment have chosen the latter usage and have felt that the decision lends itself irresistibly to parody. We submit the following as a memorial to insure that the decision will rank among the great documents of American history.

DENVER ADDRESS

One score and nineteen years ago, our legislators brought forth upon the statute books a new law, conceived of necessity, and dedicated to the proposition that interest on loans is subject to control. Now we are engaged in a great litigation, testing whether that statute or other statutes so conceived and so dedicated, do yet endure. We are met in the forum of that litigation. We have come to set aside in their final resting place those laws which, by their defective repealing attempts, permit that early law to live. It is altogether fitting and proper that we do this.

But, in a larger sense, we cannot legislate, we can-

DECLARATION OF INTERDEPENDENCE

We hold these truths to be self-evident, that all laws are created by the Legislature, that they are endowed by their creators with certain unalienable rights, that among these are the Right to control the conduct of men, Freedom from interference by other branches of government and Persistence into perpetuity until effectively repealed. That to clarify and effectuate these laws, compilers and administrators are instituted among lawyers, deriving their just Powers from the Legislature, that whenever any act of desuetude of compilers or administrators becomes destructive of these Ends, it is the Duty of the courts to alter or abolish this improper Delegation and to reinstate the Law, laying its foundation on such Principles and organizing its Powers in

not repeal, we cannot alter the laws. Those brave legislators, living and dead, who struggled to do so have passed laws beyond our powed to add or detract. The state will little note, nor long remember what we say here, but in can never forget what they did here. It is for us, the court, rather to be dedicated to the unfinished work which those who enacted these laws have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us, that from this mass of conflicting law, we take as repealed only that which they have effectively repealed; that we here highly resolve that those who prize their Session Laws shall not have saved in vain; that this court shall declare the law, and that control of loan interest, by the legislature, and for the borrowers, shall not perish from future compilations of Colorado Law.

JAMES TILLY

such form as to them shall seem most likely to effect the Integrity of the courts. Prudence, indeed, will dictate that Laws long established should not be disregarded for light and transient causes; and accordingly all Jurisprudence has shown that Debtors are more disposed to suffer high Interest rates, while the evils are sufferable, than to right themselves by abolishing the forms of Usury to which they are extra-judicially accustomed. But when a long strain of abuses, usuries and usurpations pursuing invariably the same Unconstitutional object evinces a design to reduce the people under absolute Usury, it is their Right, it is their Duty to throw off the prerogatives of the compilers, administrators and money lenders, and to restore the old laws for their future interests.

We, therefore, the Justices of the Supreme Court of the State of Colorado, in court assembled, appealing to the Supreme Judge of the World for the rectitude of our Intentions, do, in the name and by the authority of the good people of the State of Colorado, solemnly publish and declare that insofar as it has not been effectively repealed, the Moneylenders' Act of 1913 is, and of right ought to be, a fully effective and all controlling law; that it abolishes all Allegiance to compilers, administrators and money lenders; and that all extra-legislative connection between them is and ought to be totally dissolved; that it has the full power to levy war on money lenders, conclude triple damage settlements, control usurious contracts and do all other acts and things which fully effective laws may of right Do.

GEORGE BARBARY

DOUBLE TROUBLE OR NEVER SUE A LAWYER

FLOYD F. MILES
of the Denver Bar and Supreme Court Librarian

Aaron H. Palmer, Esquire, was a "respectable citizen," counsellor at law and master in chancery. Francis Mezzara was an "eminent artist" from Rome. Mutual friends introduced them. This was a mistake.

The winter of 1816-1817 in New York was cold and dreary. Mezzara was in need of meat and raiment. Palmer, Esquire, (like some lawyers of this day) was fat of purse and stuffed with vanity. Having viewed himself in a mirror with satisfaction, he deemed it fitting and proper that the image he there beheld should be preserved on canvas for future generations to look upon in awe and wonder, he therefore commissioned Mezzara to paint his portrait. When the work was completed, Palmer, probably influenced by convivial friends, who pronounced the picture more of a caricature than a portrait, declined to accept it, and, after hot words had passed, refused to pay for it. Mezzara, wounded in his pride, and considering the rejection a base and unjustified reflection on his skill and talent, vowed he would have satisfaction. He then forged the first link in his chain of disaster. He brought suit against Palmer for the agreed fee.

Upon trial, the jury after comparing the original with the portrait, concluded that Palmer was justified in refusing to accept it and returned a verdict for the defendant. Judgment for costs was entered against the plaintiff. Palmer was not one to forget small sums owing him and in due time procured an execution and placed it in the hands of the sheriff, with instruction to levy upon any property of Mezzara to be found in the county. When the sheriff appeared at his studio and demanded payment, Mezzara denied having or owning any property whatever, except the rejected portrait, which he suggested the sheriff might levy upon if it pleased his fancy. The sheriff, being an honest and conscientious public officer, it being before the days of corruption in New York City, and seeing nothing else of a tangible nature about, decided to do so, whereupon a friend of Mezzara came forward and gave bond for the production of the picture at the execution sale.

On the morning of the sale the following advertisement appeared in the "Republican Chronicle" a nonpartisan newspaper published in New York at the time:

> "CURIOUS SHERIFF'S SALE. We have been requested to announce that there will be sold, this afternoon at public vendue, at No. 133 Water Street, a PICTURE intended for the likeness of a gentleman in this city, who ordered it painted. But as the gentleman disclaimed it, it remained the property of the painter, and is now seized in execution. In order to enhance its value, the painter, who is an eminent artist from Rome, has decorated it with a pair of long ears, such as are usually worn by a certain stupid animal. The goods can be inspected previous to the sale."

The sale attracted a large crowd and there was considerable

giggling, as well as some open guffawing. The crowd became so great that the auctioneer had to remove the picture to a back room. Mr. Palmer, hanging about the outskirts of the throng and observing the obvious enjoyment of those present, decided that the best thing to do was bid the picture in and destroy it. To this end he authorized a clerk to bid in his name up to $30.00. It wasn't enough. The picture went to another bidder for $40.00. Angered and humiliated by the exhibition of himself in public adorned with ass's ears, Palmer repaired to the state's attorney where he swore out a warrant for criminal libel against Mezzara.

On August 4, 1817 the criminal case came on for trial before the Court of General Sessions and a jury. Impassioned addresses were made to the jury by counsel on both sides. James W. Wilkin, one of the most eloquent of counsel for the state inquired: "Where is this conduct to stop? Should you acquit him, he still continues to hold up this respectable citizen, this counsellor and master in chancery, to public contempt and ridicule. Should you find him guilty, I am not certain but that, to revenge himself, he will draw your pictures with his ass's ears! And I fear their honors on the bench will share the same fate!"

After considering the matter from eleven o'clock in the evening till nine o'clock the next morning, the jury returned a verdict of guilty. The Court sentenced the prisoner to pay a fine of $100.00.[1]

There is no evidence that Mezzara was able to pay his fine, and it may be assumed that he took up quarters in the debtor's goal. There in the quiet comfort of his dungeon, away from the distractions and bustle of city life, he would have leisure (at the expense of the taxpayers) to reflect upon the folly of suing a lawyer.

A PENTECOSTAL DECREE*

It is hereby ORDERED, ADJUDGED and DECREED that L. J. Turner died intestate on the 2nd day of February, 1945, at Harrisburg, Pennsylvania, leaving surviving her as her only heirs at law the persons whose names and relationship to said deceased are as follows:

F. E. Turner, son of Deceased,
3131 East Riverside Drive,
Amarillo, Texas

B. E. Turner, daughter of Deceased,
185 Mountain Drive,
Midland, Texas

and that thereupon the said decedent descended to her heirs at law and is now vested in them, subject to administration, and that said heirs are the only heirs at law of said L. J. Turner, Deceased.

* Contributed by Roscoe Walker, Jr., who uncovered the decree in an abstract examination of certain property in Utah.

[1] People v. Mezzara, 1 Am. St. Tr. 60 (N.Y. 1817).